

The Commonwealth of Massachusetts
Executive Office of Consumer Affairs

Cable Television Commission

100 Cambridge Street, Suite 2003
Boston, Massachusetts 02202



William F. Weld
Governor

(617) 727-6925

John D. Patrone
Commissioner

June 3, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20551

DOCKET FILE COPY ORIGINAL

Re: CS Docket No. 96-85

Dear Sir or Madam:

Enclosed please find the original and eleven copies of the Comments of the Massachusetts Cable Television Commission in the above-referenced matter. Pursuant to paragraph 129 of the FCC's Order and Notice of Proposed Rulemaking, please forward the comments to each Commissioner.

Thank you for your attention to this matter.

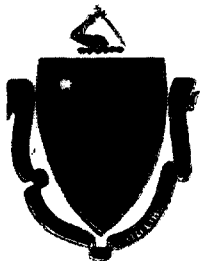
Very truly yours,

Helen Koroniades
Assistant General Counsel

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cc: Nancy Stevenson, Cable Services Bureau
International Transcription Service



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cc: Nancy Stevenson, Cable Services Bureau
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RECEIVED
JUN 04 1996
FCC TELECOM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Implementation of Cable Act)
Reform Provisions of the)
Telecommunications Act of 1996)
_____)

CS Docket No. 96-85

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**COMMENTS OF THE
MASSACHUSETTS CABLE TELEVISION COMMISSION***

I. INTRODUCTION

The Massachusetts Cable Television Commission (the "Massachusetts Commission") is the state agency charged with regulating the cable television industry in Massachusetts in accordance with Massachusetts General Laws, Chapter 166A. The Massachusetts Commission's responsibilities include representing the interests of the citizens of the Commonwealth of Massachusetts before the Federal Communications Commission ("FCC"). M.G.L. ch. 166A, § 16 (1990).

Effective October 7, 1993, the FCC certified the Massachusetts Commission under the 1992 Cable Act and the FCC's rate regulations as the state's rate regulator for the basic service tier ("BST") and associated equipment in Massachusetts. Pursuant to this certification, the

* Formally, "Massachusetts Community Antenna Television Commission under M.G.L. c. 166A §2.

Massachusetts Commission has rate regulation responsibility for 281 Massachusetts communities. Since its certification, the Massachusetts Commission has reviewed the rates filed by 20 cable operators for these 281 municipalities. In light of the broad scope of rate-making responsibilities undertaken by the Massachusetts Commission, we have a direct interest in the outcome of this proceeding.

The Massachusetts Commission responds herein to the FCC above-captioned Order and Notice of Proposed Rulemaking (hereinafter "Notice" or "Order"), requesting comment on the Implementation of Cable Act Reform Provisions in the Telecommunications Act of 1996 (the "1996 Act").

II. EFFECTIVE COMPETITION

The 1996 Act creates a fourth test or prong to the statutory definition of "effective competition." Under the 1996 Act, a cable operator will now also be subject to effective competition when "a local exchange carrier...offers video programming services...in the franchise area of an unaffiliated cable operator...but only if the video programming services...are comparable to the video programming services provided by the...cable operator in that area."¹ The Order seeks comments on proposed definitions of some specific terms used in this new effective competition prong.

A. Definition of "Offer"

¹1996 Act, § 301(b)(3)(C), *to be codified at* Communications Act, § 623(1)(1)(D).

Unlike the three prior effective competition standards, the new fourth test does not provide a percentage pass or penetration rate to be applied to a new entrant, in this case a local exchange carrier ("LEC"). Consequently, the Order seeks comment on the issue of when effective competition is met under the fourth prong. Specifically, is effective competition -- and consequently cable rate deregulation -- triggered if a LEC or its affiliate "offers" service to subscribers in any portion of the cable franchise area, or must the competing service be *offered* to some minimum portion of the franchise area and/or to a minimum percentage of subscribers in that franchise area?²

The Massachusetts Commission believes that Congress intended the fourth effective competition prong to be met when a LEC or its affiliate offers multichannel video programming to subscribers in *any* portion of a franchise area, even if the service is actually provided on a very limited basis. Because such a presence would trigger subscriber interest, and hence threaten an operator's market share, that presence alone may restrain cable rates. It would appear that if Congress was concerned about the extent of market availability or penetration of video services offered by a LEC in a given franchise, it would have made at least some reference to it when the provision was drafted. Consistent with the statutory language, we would urge the Commission to refrain from adopting its own minimum market thresholds without specific direction from the Congress in this area.

Should the Commission choose to adopt such standards on its own initiative, we would

² Notice at ¶ 72; *see generally* 47 C.F.R. § 76.905(e).

suggest that it consider a LEC's *potential* pass rate, e.g., its future capacity to readily expand the reach of its video offerings, when doing so.³ The Massachusetts Commission believes that a LEC's potential pass rate may ultimately turn out to be a more meaningful measure of a LEC's competitive impact on a cable franchise than its actual pass rate at any given point in time.⁴ Such a standard would allow an operator the flexibility of "looking ahead" to adjust its marketing, programming and rating strategies in advance of competition of a more substantial nature.

We offer this recommendation with the understanding that some LECs offering limited video services -- but with great capacity for service expansion -- may choose never to exercise this capacity in a given franchise area. Under such circumstances, immediate rate deregulation as triggered by the new effective competition prong would merely unshackle a cable operator from regulations which continue to restrict it from availing itself of marketing, programming and rating options already available to its competitors. Moreover, as both the number and market share of non-cable video providers continues to grow, consumers of cable services should be afforded an early opportunity to benefit from a cable operator's ability to anticipate, rather than react to, competition within its franchise area.

B. Definition of "Comparable Programming"

³ Notice at ¶ 72.

⁴ Notice at ¶ 72.

The Massachusetts Commission finds reasonable the position tentatively adopted in the Order that "comparable programming" should be defined to include access to at least 12 channels of programming.⁵ We do, however, have some concerns regarding the Order's discussion of Congressional intent that such programming include television broadcasting signals and especially the Commission's extensive discussion regarding the proper delivery and content of this programming.

In our opinion, the Commission should forego efforts to define either the nature or the mix of LEC broadcast programming required to trigger cable rate deregulation. It is difficult at this juncture to know what specific programming line-ups LECs may employ to compete against cable operators and other video service providers. However, it would not be unreasonable for a LEC to offer twelve or more channels made up entirely of competitive non-broadcast programming. Any conclusion at this juncture that such a line-up would neither compete with, nor challenge the market share of the cable franchise operator, would be premature. In fact, we believe such programming would be competitive if a LEC chose to provide twelve or more channels of diverse programming aimed at a large general audience. At the same time, a LEC which chose to offer twelve or more channels of niche programming, i.e. sports or music programming, could also pose a threat to a cable operator's subscriber pool by targeting certain lucrative segments of that pool.

Our recommendation would be to define "comparable" to include at least twelve

⁵ Notice at ¶ 69; *see generally* 47 C.F.R. § 76.905(g).

channels, period. Should the Commission decide that it needs to include some minimum broadcast programming requirement, we would urge the Commission to adopt a liberal standard for such programming because, as is discussed above, we do not believe it is particularly pertinent to the broader issue of what should constitute "effective competition."

Finally, the Massachusetts Commission concurs in the Order's tentative conclusion that the new test for effective competition should apply regardless of whether the LEC is merely a video service provider, as opposed to being the licensee or owner of the facilities distributing those services.⁶ In our opinion, this is not a business distinction which should warrant different treatment by the Commission. From a cable operators's perspective, if a LEC offers competitive video services within a franchise area, those services represent effective competition, regardless of who they are licensed to or who owns the facilities on which they are distributed.

C. Definition of "Affiliate"

The Massachusetts Commission agrees with the Order's tentative conclusion that the more liberal Title I definition of "affiliate" should be adopted for purposes of the new effective competition test under Title VI.⁷ We also agree that, for purposes of establishing the effective competition standard, both passive and active ownership interests should be attributable to the definition of "affiliate."

⁶ Notice at ¶ 71.

⁷ Notice at ¶¶ 74-77.

The Order also seeks comment on whether the affiliation standard must be met by a single LEC or whether the interests of more than one LEC can be aggregated to this affect.⁸ We believe that whether the affiliation standard is met by a single LEC or aggregated LEC's, both scenarios involve a LEC's capital contributions to a video service for the purpose of profiting from the provision of such services. We therefore recommend that the affiliate standard be met by either a single LEC or the aggregated interests of two or more LECs operating jointly.

III. CPST RATE COMPLAINTS

The Order seeks comment on the interim procedures for processing local franchising authority ("LFA") CPS rate complaints.⁹

Under the new law, the Massachusetts Commission will continue to be the LFA for purposes of CPS rate complaints.¹⁰ We believe that 180 days is a sufficient amount of time for an LFA to file its own complaint with the FCC. Following a rate increase, subscribers have 90 days to file a complaint. This leaves us with an additional 90 days to review the matter, provide notice to the cable operator and then determine whether or not to pursue the matter with the FCC. This amount of time is reasonable and encourages all parties to expedite the complaint

⁸ *Id.*, at ¶ 77.

⁹ Notice at ¶ 78.

¹⁰ Telecommunications Act of 1996, § 301(b)(1)(C), *to be codified at* Communications Act, § 623(c)(3).

matter, rather than get bogged down in a lengthy and unnecessarily detailed process.

In April, the Commission issued a new "Cable Programming Service Rate Complaint Form" to be completed by all Massachusetts subscribers seeking to file a CPS rate complaint. We have attached a copy of this form for the Commission's information. We believe that the new CPS rate complaint procedures established by the Commission are clear and practical, and we take this opportunity to complement the Commission on its sensible approach to this process. We particularly commend the Commission for its decision to allow LFAs, including the Massachusetts Commission, the ultimate discretion to decide whether to file CPS rate complaints with the Commission.¹¹

IV. SMALL CABLE OPERATORS

We generally support proposed rules which accelerate the deregulation of rates charged by small cable operators. Specifically, we support the proposal to establish the total number of cable subscribers in the United States on an annual basis and to use that number as the applicable threshold until a new number is calculated the following year. We believe that this methodology should assist small cable operators by providing them both adequate certainty regarding their status and greatly reduce administrative burdens.¹² As is suggested in the Order, we further

¹¹ See Appendix B to the Order, FCC Form 329 ("In no event is a local franchise authority required to file this form, or to challenge in any way an increase in cable rates, even if it receives timely subscriber complaints.")

¹² Notice at ¶ 80.

recommend the Commission adopt an average of reliable industry indicators to arrive at accurate company-specific subscriber counts.¹³

The Order also seeks comment on the definition of "gross revenues." We support the Commission's tentative adoption of the personal communications services definition. However, we believe the operator's revenues should count towards the \$250 million cap. Revenue of any kind from affiliates should be included in the calculation.

V. UNIFORM RATE REQUIREMENT

The 1996 Act amends the pre-existing requirement that a cable operator maintain a uniform rate structure throughout its franchise area by, among other things, exempting from that requirement bulk discounts offered to subscribers in multiple dwelling units ("MDU's"). The Order seeks comment on the issue of whether the bulk rate exception should allow a cable operator to offer discounted rates not only to MDU landlords who may pay one bulk rate on behalf of all building tenants, but to individually billed tenants of MDU's as well.¹⁴

We believe that operators should be permitted to offer discounted rates to subscribers regardless of the existing billing arrangements between the parties. If a competitor attempts to offer video services to an MDU owner, the incumbent cable operator should not be prohibited

¹³ Notice at ¶ 81.

¹⁴ Notice at ¶ 98.

from discounting the rate it charges to individual tenants simply because of the uniform rate requirement. Prohibiting the cable operator from providing such a discount not only hamstrings the operator's ability to compete with other providers, but also denies consumers who reside in the building the resulting discount.

VI. TECHNICAL STANDARDS

The 1996 Act eliminates a prior Commission rule which states that "[a] franchising authority may apply to the Commission for a waiver to impose cable technical standards that are more stringent than the standards prescribed by the [FCC]." The Order seeks comment on how this amendment will affect "technical considerations" pertaining to negotiations between operators and LFA's in cable franchising, renewal and transfer processes.¹⁵

In our opinion, this amendment will not have a meaningful affect on the license franchising, renewal or transfer processes. In Massachusetts, many communities include a provision in their cable license stating that if an operator does not follow FCC regulations with respect to specific technical standards and qualifications, the operator will be in non-compliance with the franchise agreement. Our experience in both the license renewal and transfer processes indicates that this provision is rarely triggered, and is therefore not problematic.

VII. PRIOR YEAR LOSSES

¹⁵ Notice at ¶¶ 103, 104.

We applaud the FCC's final cost rules which recognize the inherent difficulties of limiting an operator's start up loss recovery to a two year period. As a result of the 1996 Act, the Order seeks comment on a final rule, which permits the recovery of start up losses to all cable operators. Section 301(k)(1) of the Act states that prior year losses may be recovered with respect if "associated with a cable system . . . that is owned and operated by the original franchisee of the system."¹⁶

We do not believe that the scope of Section 301(k)(1) is limited only to the original franchisee. While this section does address cable systems owned and operated by the original franchisee, it does not explicitly prohibit other cable operators from recovering start up losses incurred prior to September 4, 1992. We submit that the current rule on start up losses applies to all cable operators. In Massachusetts, most cable systems would be precluded from recovering start up losses if the language in Section 301(k)(1) were read to exclude all other cable operators.

Most systems in this state have already been sold at least once. Consequently, during our cost of service review many cable operators had difficulty documenting their rate base because they were unable to obtain accurate financial documents from previous owners. In fact, in at least one instance, we awarded start up losses beyond the interim cost of service two year requirement to cable operators which were not the original licensees. We took this position because the operators often lacked access to their predecessor's financial records, but did present

¹⁶ Notice at ¶¶ 106-108.

sufficient evidence to support additional prior year losses.¹⁷ In light of the above, we submit that your final cost rules are appropriate and reasonable for purposes of calculating the rate base.

The Commission's rules state that reasonable start up losses may be recovered regardless of when they were incurred. Section 301(k)(1) permits only the recovery of losses incurred prior to September 4, 1992.¹⁸ We agree that recovery for losses should be permitted prior to the onset of regulation, or September 4, 1992. In fact, we have permitted operators to take more than two years of startup losses where the facts so warranted.¹⁹ Cable operators were put on notice at that time that rate regulation was in effect. Accordingly, operators had notice that any and all accounting and business records be kept in accordance with the rate rules and regulations.

The Order also seeks comment on the fact that Section 301(k)(1) contains no limitation with regard to start up losses incurred in the early years of a system's operation.²⁰ We submit that this would complement the Commission's current rule, which acknowledges that start up losses are those incurred in the early years of a system's operation.

¹⁷ Notice at ¶¶ 107, 108.

¹⁸ Notice at ¶ 108.

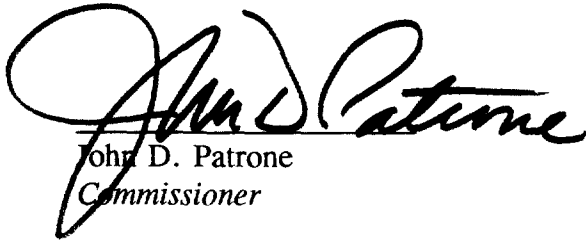
¹⁹ *In the Matter of Tele-Media Corporation*, Docket No. Gay Head Y-94 COS (June 2, 1995).

²⁰ Notice at ¶ 108.

VIII. *CONCLUSION*

We once again commend the Commission for the thoughtful and timely way in which it has dealt with a variety of challenging issues addressed Notice and Order. In particular, we are pleased that the Commission has, when appropriate, deferred to Congressional intent as shown by the plain statutory language of the Telecommunications Act of 1996. Now is the time to set minimal rules in a restrained manner, and step out of the way for competition to begin. We urge the Commission to continue down this sensible path.

Respectfully submitted,



John D. Patrone
Commissioner

CABLE PROGRAMMING SERVICE RATE COMPLAINT FORM

MASSACHUSETTS CABLE TELEVISION COMMISSION

100 Cambridge Street, Suite 2003, Boston, MA 02202

TEL: (617) 727-6925 FAX Number: (617) 727-7887

Released: 4/10/96

IMPORTANT INFORMATION. PLEASE READ CAREFULLY BEFORE FILLING OUT THIS FORM.

- A. You should use this form only to complain about rates for cable programming service, related equipment or installation.
- B. You must attach a copy of your current cable bill to this form or the Commission will be unable to process your complaint. You may also attach additional comments or explanations.
- C. At the same time you send this form to the Commission at the above address, you **MUST** send a copy of this form, including all attachments, to your local issuing authority. The local issuing authority is usually the Mayor or the Board of Selectmen. Refer to your cable bill for the correct name and address.
- D. Complaints about rate increases for cable programming services or related equipment must be received by the Commission within 90 days from the date you first recieved a bill showing the rate increase
Late-filed complaints will be returned without further review by the Commission.
- E. Please fill in all information requested on this form. If you do not do so, we may not be able to process this form. If you have any questions about how to complete the form, you may call the Commission's Complaint Investigator at (617) 727-6925.
- F. By submitting this form, you are stating your belief that your cable company's rates for your cable programming service, related equipment or installation are unreasonable.

1.	YOUR NAME			STREET ADDRESS		
	CITY	STATE	ZIP	DAY TIME PHONE (OPTIONAL)		

2.	LOCAL ISSUING AUTHORITY			STREET ADDRESS		
	CITY	STATE	ZIP			

3.	CABLE COMPANY NAME			STREET ADDRESS		
	CITY	STATE	ZIP			

4. Have you previously filed a complaint against this cable company? ☐ YES ☐ NO

If yes, on what date?

MONTH	DAY	YEAR
-------	-----	------

5. When did you first receive a bill reflecting the rate increase you are complaining about?

MONTH	DAY	YEAR
-------	-----	------

OVER

6. What is your current monthly rate for cable programming service?

\$

If you are complaining about a rate increase, what was your previous monthly rate for cable programming services?

\$

7. Have any channels been added to or dropped from your cable programming service since your last bill?

YES ☐ NO ☐

a. Number of channels have added:

b. Number of channels dropped:

8. By signing this form, I certify:

- a. That to the best of my knowlege, the information supplied on this form is true and correct: and
- b. That I am sending a copy of this complaint, including a copy of my cable bill and any additional comments, to the cable company and local issuing authority at the addresses listed above via first class mail, postage prepaid.

9.

<div style="border-top: 1px solid black; margin-bottom: 5px;"></div> <div style="display: flex; justify-content: space-between;"> Signature Date </div>

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine whether this complaint warrants referral to the FCC. All information provided in this form will be available for public inspection.